

Artistic Integrity, Public Policy and Copyright: Colorization Reduced to Black and White

[A]rt is a human activity having for its purpose the transmission to others of the highest and best feelings to which men have risen.¹

I. INTRODUCTION

Art reflects society. Each person in modern society—a society that prides itself on freedom of expression—interprets differently the beauty in art. Thus, when a musician composes a popular tune, a poet drafts a new verse, or a painter touches her brush to canvas, their creations are subject to criticism, debate, and often ridicule.² Some artists choose faster tempos, shorter sentences, brighter pastels; others choose melodic tunes, complex clauses, or no color at all. These are all artistic choices.³ They characterize both the work and the artist himself.⁴ Despite opposing viewpoints, the art world respects the artistic intent of the work, condemning any modification based upon society's standards or an individual's preference.⁵

Quite often technology discovers ways we can "improve"⁶ the products of art. Synthesizers electronically alter instrumental sounds, springfloors lift the dancer higher and farther, and word processors cut an editor's work in half. These advances facilitate the artist's ability to create or perform;⁷ they aid the artist.

However, with the recent evolution of colorization,⁸ technology has infringed upon the artist's creative intent and control.⁹ Now, computers can paint color into black and white motion pictures. This advance differs significantly from the former examples. Where these other advances may bolster or facilitate an artist's intent, the colorization process alters black and white films that were intended to remain colorless. Although citizens may shudder at the thought of washing "flesh tones on

1. L. TOLSTOY, WHAT IS ART? ch. 8 (A. Maude trans. 1899, rpt. 1985).

2. Elliot Silverstein has pointed out the panoply of creative rights accorded to directors in the basic minimum contracts between directors and producers. *Legal Issues that Arise When Color Is Added to Films Originally Produced, Sold, and Distributed in Black-and-White: Hearing Before the Subcomm. on Technology and the Law of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 6-7 (1987) [hereinafter *Colorization Hearings*] (statement of Elliot Silverstein, Directors' Guild of America), reprinted in Allen, Forman, Pollack, Rogers & Silverstein, *Colorization: The Arguments Against*, J. ARTS MGMT. & LAW, Fall 1987, at 79, 89 [hereinafter Allen].

3. *Id.*, reprinted in Allen, at 79, 89.

4. Film director Sydney Pollack: "[T]he relative worth of a director is taken from the sum of his or her choices and to take that away from the director is essentially to rob him or her of who and what they are." *Colorization Hearings*, *supra* note 2, at 21, reprinted in Allen, at 84.

5. The thesis of this Note rests upon the idea that the integrity of the artwork is not an idiosyncrasy of the art world, but a legitimate public purpose justifying legal protection of such interests in artists. See Abrams, *Historic Foundation of American Copyright Law*, 29 WAYNE L. REV. 1119, 1175 (1983). "The public purpose factor is . . . the first to be considered in the hierarchy of values of copyright analysis." *Id.* at 1175-76.

6. See *Colorization Hearings*, *supra* note 2, for statements of Roger Mayer, Rob Word, and Buddy Young in favor of colorization, reprinted in Mayer, Word & Young, *Colorization: The Arguments For*, J. ARTS MGMT. & LAW, Fall 1987, at 64 [hereinafter Mayer].

7. Different from technological advances that allow the computer scientist to change artwork, these advances, like most, are not detrimental to the artist. See Schiller, *Black and White and Brilliant: Protecting Black-and-White Films from Color-recording*, 9 COMM-ENT 523 (1988).

8. See *infra* notes 13-24 and accompanying text. See also Kohs, *Paint Your Wagon—Please!: Colorization, Copyright, and the Search for Moral Rights*, 40 FED. COMM. L.J. 1, 3 (1988).

9. Yarrow, *Action But No Consensus on Film Coloring*, N.Y. Times, July 11, 1988, at C13, col. 3.

a Da Vinci drawing,"¹⁰ many are not aware of the consequences of colorization.¹¹ This color-coding process modifies the work of filmmakers, not to mention the work of countless artists involved in a motion picture's production.¹²

Colorization has been described as simply a high-tech form of "painting by numbers."¹³ After the black and white film is copied onto videotape, a computer, assisted by a computer artist,¹⁴ assigns color to each part¹⁵ of the celluloid reproduction.¹⁶ This "colorized" version gives the film an "enhanced"¹⁷ appearance and, according to statistics, audience appeal.¹⁸

The problem lies in the destruction of what was fully intended to be a black and white film. Filmmaking involves a number of artists—a director, screenwriter, costumer, set designer, lighting designer, and so forth.¹⁹ When each of these artists prepares for the production of a black and white film, the fact that the film will be black and white affects the artistic choices they make.²⁰ Camera angles, fabrics, textures, and light intensity respectively, as well as other artistic choices, consequently are modified²¹ by the colorization process.²² Meanwhile, a new generation of American audiences is prevented from understanding the evolution of film, an art form that unlike others has its origins in the United States.²³ It is no wonder that

10. Wilson, *Colour Box*, SIGHT AND SOUND INT'L FILM Q., Summer 1986, at 79 (referring to quote from film director John Huston, "the vulgarity of the whole idea [of colorization] . . ." is "as great an impertinence as for someone to wash flesh tones on a Da Vinci drawing. . .").

11. See Kohs, *supra* note 8, at 2. See also Asher, *Colorizing black and white motion pictures equals a crime against art!*, SEVENTEEN, Nov. 1987, at 78-79; Wilson, *supra* note 10.

12. Goldberg, *Colorization Over the Rainbow*, 197 N.Y.L.J. 1, 5 (1987).

13. Kohs, *supra* note 8, at 4. This fact also speaks to the issue that "coloring," as in "coloring book," is a mindless activity and not worthy of credit as "artistic effort or merit." See *Sargent v. American Greetings Corp.*, 588 F. Supp. 912, 918 (N.D. Ohio 1984), where the court found a question of material fact with respect to defendant's contention that colorization of pencil line artwork shows insufficient originality to escape copyright liability. In requesting a separate copyright for their colorized works, proponents of the colorization process rationalize their computer techniques as such "artistry." But see *Colorization Hearings*, *supra* note 2, at 30-31 (statement of Woody Allen), *reprinted in* Allen, at 81 (such procedures not artistry but derogation from art).

14. Computers cannot act without human programmers. Thus computer colorizers make the argument that what they do is art. Opponents to colorization argue that never has our society given honor to those who can "color between the lines," but have rather rewarded those who can "create with color" a work of art. In fact, colorized versions lack the precision of early hand-painted films, "Colors [are] not exact"; "Richness of detail is often lost"; and therefore these versions are "not aesthetically [any] better than the original black and white." *Registration of Claims to Copyright Notice of Inquiry; Colorization of Motion Pictures* (U.S. Copyright Office 1986) (Docket No. 86-1) (DGA Comments) [hereinafter DGA Comments].

15. The computer reads over 500,000 of these parts, or pixels, as part of each frame of the video reproduction of the film. For a more extensive discussion of the colorization process see Kohs, *supra* note 8, at 4.

16. *Id.* The computer assigns the color, not the artist.

17. Colorizers regard their work as an "enhancement" of the original black and white motion picture. See, e.g., *Colorization Hearings*, *supra* note 2, at 82-83 (statement of Rob Word, senior vice president, Hal Roach Studios, Inc.), *reprinted in* Mayer, *supra* note 6, at 72.

18. Kohs, *supra* note 8, at 5.

19. *Colorization Hearings*, *supra* note 2, at 39 (testimony of Ginger Rogers), *reprinted in* Allen, at 86.

20. DGA Comments, *supra* note 14.

21. See Porter, *Film Copyright: Film Culture*, SCREEN, Spring 1978, at 90, 94-95 ("All artists involved in motion pictures are contributors to the artwork, and therefore hold some moral right to the artwork. . ."). This is the French point of view, as well. See also Kohs, *supra* note 8, at 7.

22. "The addition of artificial color cannot improve upon the original merits of a film, but it can certainly destroy them." *Colorization Hearings*, *supra* note 2, at 41 (quote of actor James Stewart).

23. Since the exhibition of a film is crucial to its existence and appreciation, the replacement of black and white films with colorized versions would affect a new audience's perception of the original, intended form of the film.

numerous artists' unions and organizations have taken a public stand against this computer process.²⁴ Still, no legal tenet yet exists to protect these American masterpieces from alteration or even to require artistic consent before colorization.²⁵ Thus, American moviemakers must rely on the European theory of moral right to protect fully the artistic integrity of their work.²⁶ The controversy arises between the principle of ownership, which American copyright law protects, and creative rights or moral rights, which exist only in the European jurisdictions adopting the full breadth of the Berne Convention.²⁷ The belief that creative rights are protected under American copyright laws is a complete misconception.²⁸

Copyright is a patrimonial or property right that can be distinguished from moral right or, as classified in civil law doctrine, the right of personality.²⁹ Copyright protects the artist's pecuniary interest in the art work, while moral right is one of a small group of rights intended to recognize and protect the individual's personality—the right to one's name; to one's reputation; to one's identity, occupation, or profession; to the integrity of one's person; and to privacy.³⁰ American law has overlooked this fundamental right of the artist that some believe goes to the essence of art itself.³¹

Although our copyright laws have been strengthened recently—disclaimers are now required on designated colorized films³²—it is evident from caselaw that judges and courts have struggled when confronted with a moral right issue.³³ Because no moral right exists in the United States today, judges themselves have resorted to creative means—stretching, manipulating, and even misconstruing existing legal

24. Canby, *Through a Tinted Glass, Darkly*, N.Y. Times, Nov. 30, 1986, § 2, at 19, col. 1 (Anticolorization activists include the American Film Institute, the Directors Guild of America, the American Society of Cinematographers, the Writers Guild of America West, the Screen Actors Guild, the Costume Designers Guild, the National Society of Film Critics, and the editorial board of *Film Quarterly* magazine.).

25. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 518–19 (1967).

26. *House Panel Hears Testimony on Film Colorization Legislation*, 36 Pat., Trademark & Copyright J. (BNA) No. 886, at 201 (June 23, 1988) [hereinafter *House Panel*].

27. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1025 (1976).

28. Kohs, *supra* note 8, at 7–9.

29. Merryman, *supra* note 27, at 1025.

30. *Id.*

31. Comment, *Toward Artistic Integrity: Employment of Moral Rights in America*, 60 GEO. L.J. 1539, 1541 (1972). See also *Colorization Hearings*, *supra* note 2, at 30–32, reprinted in Allen, at 84.

32. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2853 (codified as amendments to various sections of 17 U.S.C.A. (West Supp. 1989)). The Library of Congress recently designated the first 25 films to be made part of the National Film Registry. See *infra* note 159 and accompanying text. The honor bestows upon the films the limited protection of a colorization disclaimer. See *infra* note 160 and accompanying text. The following films have been selected: *The Best Years of Our Lives*, 1946; *Casablanca*, 1942; *Citizen Kane*, 1941; *The Crowd*, 1928; *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb*, 1964; *The General*, 1927; *Gone With the Wind*, 1939; *The Grapes of Wrath*, 1940; *High Noon*, 1952; *Intolerance*, 1916; *The Learning Tree*, 1969; *The Maltese Falcon*, 1941; *Mr. Smith Goes to Washington*, 1939; *Modern Times*, 1936; *Nanook of the North*, 1922; *On the Waterfront*, 1954; *The Searchers*, 1956; *Singin' in the Rain*, 1952; *Snow White and the Seven Dwarves*, 1937; *Some Like it Hot*, 1959; *Star Wars*, 1977; *Sunrise*, 1927; *Sunset Boulevard*, 1950; *Vertigo*, 1958; *The Wizard of Oz*, 1939.

33. See, e.g., *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976); *Preminger v. Columbia Pictures Corp.*, 49 Misc. 2d 363, 267 N.Y.S.2d 594 (Sup. Ct.), *aff'd*, 25 A.D.2d 830, 269 N.Y.S.2d 913 (per curiam) (Rabin, J., dissenting), *aff'd mem.*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966); *Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd mem.*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949) (per curiam). See also *infra* Section III.

doctrines to supply remedies for injured artists and authors.³⁴ Although legislators have consistently proposed establishing moral right in American law, legislation to protect the artist and the original intent of his or her work has been rejected.³⁵ Therefore, the American artist continues to be inadequately protected within the borders of the United States.³⁶

This Note will first briefly review the historical context of the European model for moral right and copyright³⁷ and its relationship to the American Copyright Act of 1976.³⁸ The Note will then examine the awkward judicial manipulation of American legal doctrine to protect those interests that the moral right doctrine more adequately addresses. In addition, the Note will discuss the vacillation of the French courts in a case involving the applicability of the moral right doctrine to a television broadcast of a colorized version of the American film *Asphalt Jungle*. The Note concludes by reviewing the value of new copyright legislation and proposals, which show movement toward full accession to the European convention, and makes recommendations for a prompt resolution of the moral right dilemma.

II. THE HISTORY OF COPYRIGHT LAW

A. *European Approach: The Berne Convention*

Of the two dominant theories addressing the sale and procurement of artistic and literary works,³⁹ the European one is the more comprehensive.⁴⁰ The Berne Convention for the Protection of Literary and Artistic Works includes language that parallels moral right.⁴¹ Nearly all the European nations subscribe to the Berne Convention, although some have individual statutes that may strengthen or weaken

34. *Id.* See also Comment, *supra* note 31, at 1545–54.

35. See *House Panel*, *supra* note 26. See *infra* notes 155–59 and accompanying text.

36. *Hope is Slim for Legislation to Ban Film Coloring*, N.Y. Times, June 19, 1988, § 1, pt. 2, at col. 2.

37. The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 12 Martens (2nd) 173. Moral right was integrated into the Berne Convention at the Rome Conference of 1928. Article 6*bis* provides that:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where the protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

The Berne Convention For the Protection of Literary and Artistic Works, Paris Text, July 24, 1971, art. 6*bis*, reprinted in 4 M. NIMMER, NIMMER ON COPYRIGHT app. at 27-5 (1987) [hereinafter Berne text].

38. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amendment to, and as subsequently amended at, 17 U.S.C. (1982 & Supp. III 1985) and 17 U.S.C.A. (West Supp. 1989).

39. Porter, *supra* note 21, at 94.

40. Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VANDERBILT L. REV. 1, 11–12 (1985).

41. Berne text, *supra* note 37. Kwall notes that the Berne Convention language is intended to allow legislation of the respective Convention members to govern substantive application of the right. Kwall, *supra* note 40, at 11.

scrutiny or standards.⁴² Moral right is a composite right characterized by three distinct components: the right of disclosure; the right of paternity; and the right of integrity. The phrase moral right is a translation from the French term *droit moral*.⁴³ The English version may not convey adequately the idea of an "intellectual concept" or "inner meaning" which is inherent in the French term "moral."⁴⁴ Therefore, "*droit moral* does not refer exclusively to rights inherent in our notion of morality, but also encompasses a right that exists in an entity's ultimate being."⁴⁵

The right to disclosure provides the creator with the power to be the sole judge of his creation and its development.⁴⁶ Such artistic exclusivity enables the artist to decide when—if ever—the artwork is complete and when—if ever—the artwork will be exhibited.⁴⁷

The right to paternity is the right of the artist to insist that his work be associated with his name or to discredit work falsely attributed to him.⁴⁸ In many countries, this right is an unwaivable right afforded to the artist despite written agreement or otherwise.⁴⁹ In literary contexts, the right to paternity has been recognized to be of great importance.⁵⁰

The right of integrity is the key to the moral right doctrine.⁵¹ This right prevents those who make alterations from destroying "the spirit and character of the author's work."⁵² This right has emerged in artistic legal controversies more often than the other two, because it involves the preservation of personal values and interests attached to the art. In addition, the right of integrity has the greatest potential for violation because any modification of an artwork may be considered detrimental to the integrity of that work.⁵³

42. Kwall, *supra* note 40, at 11. Interestingly, three nations have conspicuously abstained from Berne accession: the People's Republic of China, the Soviet Union, and until recently (without full accession), the United States.

43. Kwall, *supra* note 40, at 3 n.6.

44. *Id.* (citing Naoum, *Federal Preemption Under the Copyright Act of 1976: Do Moral Rights Survive?* (1984) (unpublished paper in Kwall's file)).

45. *Id.* (citing Naoum).

46. Justice Brandeis implicitly identified the right of disclosure as among the fundamental rights of individual property: "An essential element of individual property is the legal right to exclude others from enjoying [the article of property]." *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). In the realm of art, the artist has an initial right to exclude all others from enjoyment of the artist's own creation, to the extent that that creation is still the artist's own property.

47. Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 467 (1968) ("Only the author can decide whether his work corresponds to his original conception, at what moment it is completed, and whether it is worthy of him."); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 558-61 (1940).

48. *Drummond v. Altemus*, 60 Fed. 338 (C.C.E.D. Pa. 1894) (granting injunction protecting creator's right to paternity on the basis that "such a right . . . is too well settled upon reason and authority to require demonstration." (emphasis added)).

49. See Sarraute, *supra* note 47, at 478-79; but see Roeder, *supra* note 47, at 564-65.

50. *Clemens v. Press Publishing Co.*, 67 Misc. 183, 122 N.Y.S. 206 (1910) (contract for sale of a piece of writing between author and publisher construed to imply a paternity-type right in the author); see generally Roeder, *supra* note 47, at 562-63.

51. Roeder, *supra* note 47, at 565; Nimmer, *supra* note 25, at 522-23 (arguing that article 6bis of the Berne Convention must imply some protection for the author from alteration of her work).

52. Kwall, *supra* note 40, at 8.

53. Roeder, *supra* note 47, at 570-72 (A modification that alters the "intrinsic esthetic quality of the work" is a violation of the right. *Id.* at 571).

B. *The American Copyright Doctrine and the Constitution*

1. *Historical Foundation*

Second of the two dominant theories, the American law of copyright is derived essentially from its literal meaning—the right to copy.⁵⁴ This theory protects only the economic or pecuniary interests of the copyright owner,⁵⁵ even though copyright has been regarded historically as an author's right to the fruits of his intellectual labor and as a protection for the benefit conferred by an artist on the public.⁵⁶ The benefit encompasses more than purely economic interests.⁵⁷

American copyright law is based upon England's Statute of Anne.⁵⁸ The United States has preserved this English doctrine in its purest form.⁵⁹ The primary purpose of the Statute of Anne was to protect London publishers from Scottish competitors.⁶⁰ The English statute was constructed narrowly, and not designed to control the numerous types of artwork covered by the copyright statutes of today. Interestingly, other countries that also have used the Statute of Anne as the basis for their copyright statutes have modified the statute entirely.⁶¹

Thus, American copyright law is "an owner's statute and not an author's statute."⁶² The American ideology as to property ownership encompasses the belief that "if [you] own something, you can do what [you] want with it."⁶³ U.S. copyrights remain silent as to any protection of the creator's rights in the artwork. Through history, this free alienability of art has not only brought destruction to the works of many of the world's greatest talents, but has come to be considered immoral.⁶⁴

Under the amended Copyright Act of 1976, the duration of copyrights parallels

54. Kohs, *supra* note 8, at 8. *See also* Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

55. Kohs, *supra* note 8, at 8.

56. *See* Abrams, *supra* note 5, at 1122. *See also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

57. Dawson, *Raider of the Last Archives: Ted Turner*, AMER. FILM, Jan./Feb. 1989, at 39 (Ted Turner comments, "Movies were not made as art, they were made to make money. Any moviemaker who made movies for art's sake is out of business."). Opponents to colorization disagree. *See Colorization Hearings*, *supra* note 2, at 27–30, reprinted in Allen, at 79–80 (statement of Woody Allen).

58. Comment, *supra* note 31, at 1542; Act for the Encouragement of Learning etc., 1709, 8 Anne, ch. 19.

59. Comment, *supra* note 31, at 1542 (citing Ringer, *Copyright, Recent Developments and Future Prospects on the National Level in English-Speaking Countries*, WORLD INTELLECTUAL PROPERTY ORGANIZATION LECTURES: CURRENT TRENDS IN THE FIELD OF INTELLECTUAL PROPERTY 211, 212–14 (1971)).

60. *Id.*

61. By the 1886 adoption of the Berne Convention, the English statute was pervaded by the moral right ideals. For a discussion of the major differences between the American doctrine and the moral right statutes of Europe, see Kohs, *supra* note 8, at 12–15.

62. Comment, *supra* note 31, at 1542 (citing Ringer, *Copyright, Recent Developments and Future Prospects on the National Level in English-Speaking Countries*, WORLD INTELLECTUAL PROPERTY ORGANIZATION LECTURES: CURRENT TRENDS IN THE FIELD OF INTELLECTUAL PROPERTY 211, 213 (1971)).

63. Honan, *Artists, Newly Militant, Fight for Their Rights*, N.Y. Times, Mar. 3, 1988, at 29, col. 1. (In reaction to Huston's outrage from the first broadcast of WTBS's colorized version of *The Maltese Falcon*, Ted Turner replied, "The last time I checked, I owned those films.").

64. For example, Michelangelo's *Last Judgment* was altered and nearly destroyed by orders of the Vatican because it violated church dogma and ideals of decorum. But with the institution of civilized governments and laws, simple severance of a group of works has been considered "destruction of the aesthetic intent" of the artwork. *See* Nimmer, *supra* note 25, at 521; and Merryman, *supra* note 27, at 1023 n.1; Roeder, *supra* note 47, at 571.

French copyright law, which extends the copyright fifty years after the death of the creator.⁶⁵ The Berne Convention advocates that moral rights terminate simultaneously with a creation's copyright.⁶⁶ The French, however, see moral rights as perpetual and inalienable—the personality regarded as separate from the mortal, *i.e.* pecuniary, interests.⁶⁷ This idea protects the works from ever facing willful destruction or alteration, a protection even greater than that afforded by the Berne Convention.⁶⁸ In the United States, works enter the public domain when the extended period of fifty years expires, at which time anyone may access and use the works (or copies) without special permission or sanction.⁶⁹

2. Constitutional Foundation

The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." ⁷⁰ This first amendment right can be invoked to defend a copyright owner's exhibition of altered artworks.⁷¹ However, common law and constitutional law recognize a limitation on "free expression"—a right to privacy:

[I]t has been found necessary from time to time to define anew the exact nature and extent of [full protection in person and in property]. . . . Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. . . . Gradually the scope of these *légales* rights [to be free from physical interference with life and property] broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; . . . and the term property has grown to comprise every form of possession—intangible, as well as tangible. . . . ⁷²

The right to privacy can be analogized to moral right in that it is a right that is implied and therefore easily overlooked. No one would consider such rights a necessity *until* they are infringed. Colorization may function as the "infringement" that highlights the importance of defining moral right, just as earlier cases necessitated the definition of privacy rights.⁷³

65. 17 U.S.C. §§ 301, 302 (1982).

66. Berne text, *supra* note 37.

67. Article 6 of the French copyright statute states:

The author shall enjoy the right to respect for his name, his authorship, and his work. This right shall be attached to his person.

It shall be *perpetual, inalienable and imprescriptible*.

It may be transmitted *mortis causa* to the heirs of the author.

The exercise of this right may be conferred on a third person by testamentary provisions.

Law No. 57-298 of March 11, 1957, art. 6, as amended by Law No. 85-660 of July 3, 1985, both laws printed in CODE CIVIL [C. CIV.] (87th ed. Dalloz 1982-88) after art. 543 thereof, as cited and translated in UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION & WORLD INTELLECTUAL PROPERTY ORGANIZATION, COPYRIGHT LAWS AND TREATIES OF THE WORLD supp. (France: Item 1) (1987) (emphasis added).

68. Berne text, *supra* note 37.

69. 17 U.S.C. §§ 302, 303 (1982).

70. U.S. CONST. amend. I.

71. See *Colorization Hearings*, *supra* note 2, at 72-73, reprinted in Mayer, *supra* note 6, at 69 (statement of R. Mayer).

72. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

73. *Id.* at 193-97. Celebrated cases delineating a constitutional privacy right include *Roe v. Wade*, 410 U.S. 113 (1973) and *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Thus a comparable "growth of rights" is at issue with colorization's infringement of artistic integrity. Yet protection for moral rights comparable to that accorded to privacy rights does *not* exist. The framers of the Constitution did not consider the "intangible" idea of moral right. The mere failure of the Constitution and the common law to formulate moral right expressly, however, does not mean that such rights do not exist or that American artists and creators are not entitled to them. The Constitution does not *explicitly* require protection for a "creator's inherent rights" any more than it requires the "right to be let alone." A constitutional right of privacy has nonetheless been recognized. Moral right has not yet achieved recognition by judges and legislators.

Whether or not a moral right is created by the Bill of Rights, it is certain that clause 8 of section 8 of the first article of the U.S. Constitution forms the basis for our copyright law and would allow the statutory creation of moral right.⁷⁴ This power to create statutory rights is not limited to creating a right to exclusive use of an author's expression. Legislation pursuant to article I, section 8 should protect moral right as well. Congress has the power—and perhaps the obligation—to recognize moral right; the only question is its willingness to do so.⁷⁵ Moral right exists independently of present copyright.⁷⁶ Legal academics consistently question the theory that American copyright law compensates adequately for moral right interests.⁷⁷

Colorization may be a product of "the progress of science;" however, this process—at least with respect to black and white motion pictures—is not promoting the "Progress of . . . [the] Arts," which is one of the constitutional bases for the grant of power to make a copyright law in article I, section 8, clause 8.⁷⁸ Instead, colorization alters the artistic intent of films that are historically significant and celebrated for their artistry.⁷⁹

74. "[Congress shall have the Power] [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ." U.S. CONST. art. I, § 8, cl. 8.

75. Abrams, *supra* note 5, at 1136.

76. Comment, *supra* note 31, at 1541.

77. See, e.g., Roeder, *supra* note 47; Kwall, *supra* note 40; Merryman, *supra* note 27; Kohs, *supra* note 8; Comment, *The Colorization Dispute: Moral Rights Theory As a Means of Judicial and Legislative Reform*, 38 EMORY L.J. 237 (1989).

78. Abrams, *supra* note 5, at 1120–22 (distinguishing economic monopoly view of copyright from the natural-right-of-the-creator approach). The language of certain Supreme Court decisions articulates the idea that the underlying policy of the copyright law is not confined to the pecuniary reward of the copyright holder, but embraces a larger conception of public good. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (The Court stated that "[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration." By letting the lower court enjoin Paramount (on antitrust grounds) from conditioning the use of one of its copyrighted films on the exhibition of other Paramount films, the Court effectively limited the copyright holder's property rights in the motion picture, and it did so by invoking the higher public policy inherent in the copyright law. See also *Twentieth Century Music v. Aiken*, 422 U.S. 151, 156 (1974) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the causes of promoting broad public availability of literature and music and other art.") (footnote omitted). In the moral right context, it is the availability of historically unadulterated, artistically intact works that the law should serve.).

79. *Colorization Hearings*, *supra* note 2.

3. Construction of State and Federal Statutes

For a number of reasons, the "tilted scale" of American copyright doctrine has never "been levelled by the weight of statutory revision, judicial recognition of moral right, or [complete] adoption of the Berne Convention."⁸⁰ The primary reason appears to be the spread of confusion over moral right protection from the federal to the state level. Some states observe moral rights, but do not recognize motion pictures as a "true visual art form," thus leaving films unprotected.⁸¹ In the federal law context, section 102(a)(6) of the 1976 Act equates motion pictures with "visual art, literature, and music."⁸² However, the Act itself provides no moral right protections.

Furthermore, the authority of state courts over moral right disputes is unclear.⁸³ Section 301 of the 1976 Copyright Act governs the relationship between the federal statute and state law.⁸⁴ This section provides that state law is not preempted: 1) if a work does not fall within the "subject matter" of federal copyright law because of its nature/form of expression,⁸⁵ or 2) if the right protected by state law is not equivalent to any of the exclusive rights within the "general scope of copyright law."⁸⁶ Motion pictures are a recognized art form under the statute and are therefore within its "subject matter."⁸⁷ On the other hand, to the extent that moral right is *not* protected by the federal statute and is "not within the general scope of copyright," state law is not preempted. Moral right must be found to be an element of an action "beyond mere reproduction or the like."⁸⁸ to escape preemption in this way.

The 1976 Act focuses on the economic aspects of copyright, ensuring the copyright owner of all possible financial rewards to which he is entitled. However, no words even remotely concede to the copyright owner a license to transform or

80. Comment, *supra* note 31, at 1542. See also *Granz v. Harris*, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J., concurring); *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947), *cert. denied*, 335 U.S. 813 (1948); *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 575, 89 N.Y.S.2d 813, 818 (Sup. Ct. 1949). These cases attempt to support a cause of action based upon moral rights, but the claims are dismissed because "no law exists." No court denies that other [European] forums honor the protections, but all feel uncomfortable setting original precedent. Therefore, the courts opt for a more "tangible," although less practical copyright remedy, or find no cause of action under moral right.

81. See CAL. CIV. CODE § 987(c)(1) (West 1983); MASS. GEN. LAWS ANN. ch. 231 § 85(S) (Law. Co-op 1986); N.Y. ARTS & CULTURE LAW, § 14.51-.59 (McKinney 1984). All these laws strengthen visual art protection, but both the New York and California statutes exclude motion pictures and conflict with the federal law. For discussion see Koven, *Observations on the Massachusetts Art Preservation Act*, 71 MASS. L. REV. 101 (1986); Kwall, *supra* note 40, at 29-33; McDonough, *The California Art Preservation Act: Statutory Protection of Art Work Against Intentional Alteration or Destruction*, 49 U. CIN. L. REV. 486 (1980); Smith, *New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158 (1984).

82. Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include . . . motion pictures and other audiovisual works; . . .

17 U.S.C. § 102(a)(6) (1982).

83. At least a state court's authority over moral rights, or more specifically colorization, is unclear because of the overlap of state and federal laws (in Massachusetts, California, and New York). See *supra* note 81 and accompanying text.

84. 17 U.S.C. § 301 (1988).

85. § 301(b)(1).

86. § 301(b)(3).

87. Motion pictures are designated as "works of authorship" under § 102(a)(6) of the Act, and therefore fall within the general scope of the federal Act. Preemption prevents motion pictures from consideration under these state statutes, even if (as in the case of Massachusetts) films are included within the provisions.

88. *Harper & Row, Publishers v. Nation Enter.*, 735 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985), *cited in* *Brignoli v. Balch, Hardy & Scheinman, Inc.*, 645 F.Supp. 1201, 1205 (S.D.N.Y. 1986).

"enhance" the work of art and thereafter continue to attribute the work to the artist or author. Therefore, the moral right theory is fully compatible with the central concerns of the federal copyright statute and its constitutional underpinnings, even while it is at odds with the statute as currently written and construed.

Colorizers claim that their color-coded reproductions qualify as derivative works of the black and white classic. Even though the Copyright Office hesitated before granting a separate copyright to the colorized version of Frank Capra's *It's A Wonderful Life*,⁸⁹ and despite problems resulting from the "substantial variation" test prescribed by the Copyright Act and caselaw, colorized versions may be copyrighted.⁹⁰ In order for a derivative work to qualify for its own copyright, it must "substantially vary" from the underlying work.⁹¹ Here the colorizers contradict themselves. They claim their works neither alter nor destroy the essence of the original black and white film, yet they claim their colorized versions are unique, clearly satisfying the "substantial variation" standard. Because this standard for originality is construed liberally,⁹² exploitation of colorized versions persists, and computer artists continue to claim an original artist's "enhanced" work as their own creation. Yet this must logically undermine the colorizers position that they are not unduly tampering with the work of other artists: either a colorized film is a new work (deserving protection) or it is the modification—that is, adulteration—of another's work (deserving condemnation).⁹³

89. Concerning derivative works, the statute reads:

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 103 (1988).

After submission of *It's A Wonderful Life* for a separate copyright, the copyright office requested that interested parties send comments and information regarding the technical processes involved, the nature of the artistic decisions made, and the commercial intent of the "authors" to assist it in developing practices regarding the registration of colorized films. On June 22, 1987, the Copyright Office officially granted special protection to colorized films provided they possess "sufficient originality." 52 Fed. Reg. 23, 442-43 (Feb. 4, 1987); see also 34 Pat. Trademark & Copyright J. (BNA) No. 214, 222 (1988).

90. 52 Fed. Reg. 23, 442-43 (Feb. 4, 1987). See also Kohs, *supra* note 8, at 20-21; Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc., 191 F.2d 99, 101 (2d Cir. 1951); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

91. In *Bleistein*, Justice Holmes did not focus on the aesthetics of the work, but on its originality. It is agreed that the courts should not be the arbiters of aesthetics, nor should they determine what is art: "It is not for the court to substitute its taste for that of the public. . . . No matter how poor artistically the 'author's' addition, it is enough if it is his own." *Bleistein*, 188 U.S. at 250. Of course, if the great cinematic artists of our era are "disgusted" by these modifications, perhaps it is their judgment to which we should adhere. See NAT'L L.J., July 27, 1987, at 10, col. 2 (quote of James Stewart).

92. *Bell*, 191 F.2d at 99 (Copyright requires only a *de minimis* originality standard.). But cf. *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945) (the required quantum of originality has been defined as "substantial, but not merely trivial."). For further discussion of the inconsistency and ambiguity of the standard of originality required of derivative works, see Landau, *The Colorization of Black-And-White Motion Pictures: A Grey Area in the Law*, 22 LOY. L.A.L. REV. 1161, 1167-73 (1989).

93. This point is made by Kohs, *supra* note 8, at 20.

III. WITHOUT MORAL RIGHT: JUDICIAL ATTEMPTS TO COMPENSATE

Courts and judges in past years have illustrated their discomfort resulting from the omission of a moral right doctrine in the American legal system. Although few written decisions enhance the prospect that moral right belongs in American law,⁹⁴ the actions courts have taken speak loudly. Because no sufficient legal remedy is available to the injured artist, the courts resort to manipulation of other legal theories to compensate for the absence of moral right. Interestingly, typical moral right remedies can be found disguised among more traditional American legal remedies.⁹⁵

A. *Defamation, Libel, and the Right of Publicity*

When one exploits a distorted version of a work which tends to injure its creator's reputation by diminishing "esteem, respect, goodwill, or confidence," a defamatory act has been committed.⁹⁶ If Ted Turner⁹⁷ holds out the colorized version of *Manhattan* as a Woody Allen film (proclaiming that it is merely "color enhanced"), it would be defamatory to Mr. Allen.⁹⁸ However, a defamation action fails to satisfy the colorization and moral right dilemma because "a cause of action under defamation statutes expires upon the death of the artist," reducing the timespan of protection,⁹⁹ and because publication of defamatory matter is rarely enjoined by the courts due to the "rising tide of sentiment in favor of freedom of speech. . . ."¹⁰⁰

Defamation, like a "false light" or "right to privacy"¹⁰¹ theory, would protect

94. *Granz v. Harris*, 198 F.2d 585, 591 (2d Cir. 1952) (moral rights of artists not followed because "not necessary to do so"); *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947) (photographer's moral rights not at issue because of contract); *Harris v. Twentieth Century-Fox Film Corp.*, 43 F. Supp. 119 (S.D.N.Y. 1942) (Contract provision overshadows writer's moral right to recognition for work on screenplay.); *Seroff v. Simon & Schuster, Inc.*, 6 Misc. 2d 383, 162 N.Y.S.2d 770 (Sup. Ct. 1957), *aff'd mem.*, 12 A.D.2d 475, 210 N.Y.S.2d 479 (1960), *appeal denied mem.*, 12 A.D.2d 755, 210 N.Y.S.2d 1000 (1961) (author cannot hold publisher liable for distorted translation); *Shostakovich v. Twentieth Century Fox Film Corp.*, 196 Misc. 67, 70, 80 N.Y.S.2d 575, 578 (Sup. Ct. 1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949) (in a proper case, moral right could be used to protect the rights of artists). *See also* Comment, *supra* note 77, at 262-67.

95. *See* Kwall, *supra* note 48, at 17-31; *see also* Comment, *supra* note 31. Both articles deal with American legal doctrines that may be extended to include moral right remedies; however, the more recent article by Ms. Kwall illustrates the inadequacy of these possible doctrines and the false optimism of the Comment's proposals for adequate extension of the legal theories. *See also* Comment, *supra* note 77.

96. W. KEETON, PROSSER & KEETON ON TORTS § 111, at 773 (5th ed. 1984) (footnotes omitted).

97. Ted Turner is a television entrepreneur and the purchaser of the RKO and MGM film libraries. He is also one of the leading advocates of the colorization process. His Turner Network Television (TNT), has already established the "Colorized Classics Network" (CCN) which broadcasts Turner's colorized versions. *See* Dawson, *supra* note 57.

98. Woody Allen has been one of the leading, if not the most outspoken, directors against colorization. Considering Mr. Allen is a modern director, and still chooses to make films in black and white (his career beginning well after color film was perfected), the colorization of one of his movies would be considered a serious violation of his creativity and work. *See Colorization Hearings*, *supra* note 2, at 30-31, *reprinted in* Allen, at 81.

99. W. KEETON, *supra* note 96, § 111, at 778.

100. W. PROSSER, THE LAW OF TORTS § 111 (4th ed. 1971). *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stressing the importance of free discussion of issues to insure that varying opinions are not withheld from the public).

101. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 398-401 (1960). False light and right to privacy arguments are explained in Prosser's article; however, both fail to protect moral rights, like the defamation and right of publicity theories. Therefore, they are dealt with cursorily.

the artist's work only tangentially while performing its primary function of protecting the artist's reputation. In *Locke v. Benton & Bowles, Inc.*,¹⁰² a complaint alleging broadcast of "false interpolations" by the radio commentator Floyd Gibbons was held sufficient to state a cause of action sounding in defamation against the producer of the radio program. In the case, the plaintiff had prepared a serious report on flooding in the Ohio valley, but the defendants had added false material to the commentator's presentation of the report to heighten the melodramatic effect.¹⁰³ The adulterated report was attributed to the author, allegedly resulting in the loss of his job and his reputation as a reporter.¹⁰⁴ However, when the plaintiff sued Gibbons directly, the court dismissed the complaint for failure to allege all the necessary elements of slander.¹⁰⁵ Thus, inherent difficulties arise in libel theory for protection of moral rights.

American law does not recognize an author's right to develop a reputation in his work, but it does recognize an individual's right to take advantage of his or her existing name and reputation.¹⁰⁶ In *Clemens v. Press Publishing Co.*,¹⁰⁷ the New York Court alluded to the interest authors have in the integrity of their work.¹⁰⁸ Publication under an author's name—or associating a performance with an actor's name—"necessarily affects his reputation and standing and thus impairs or increases his future earning capacity."¹⁰⁹ The court observed that a publisher "cannot garble" or put out the author's work under any name other than the author's own.¹¹⁰ In the case, a publisher agreed to purchase a story from the author, who tendered the story but insisted that it could not be published without the author's name. Because of this requirement, the publisher decided not to publish the story and refused to pay on the contract, claiming breach of contract by the author. The court found for the author on a contract theory that the publication with the author's name was contemplated in the original agreement.¹¹¹

In other American cases, courts protect the right of publicity.¹¹² The mere use of an author's name does not give rise to a cause of action under the right. Rather, the author must show that the defendant used an author's name to appropriate the

102. 165 Misc. 631, 1 N.Y.S.2d 240 (Sup. Ct. 1937), *rev'd*, 253 A.D. 369, 2 N.Y.S.2d 150 (1938) (The appeals court ordered dismissal with leave to file an amended complaint so that the plaintiff could set forth the alleged defamatory words in the complaint.).

103. *Id.* at 632, 1 N.Y.S.2d at 241.

104. *Id.* at 633, 1 N.Y.S.2d at 242.

105. *Locke v. Gibbons*, 164 Misc. 877, 299 N.Y.S. 188, *aff'd*, 253 A.D. 887, 2 N.Y.S.2d 1015 (1938).

106. *W. Keeton*, *supra* note 96, § 117, at 852.

107. 67 Misc. 183, 122 N.Y.S. 206 (Sup. Ct. 1910) (67 Misc. gives the opinion of Seabury, J., first, and calls the opinion of Gavegan, J., a concurring one, while 122 N.Y.S. does the opposite.).

108. *Id.* Although moral right remedies would have been effective here, they were never seriously considered by the court.

109. *Clemens*, 67 Misc. at 184, 122 N.Y.S. at 208 (Seabury, J.) (In his opinion, Judge Seabury noted that the sale of rights to a literary work was not in every way analogous to a sale of a barrel of pork. *Id.* at 184, 122 N.Y.S. at 207.). See *infra* note 184.

110. *Id.* at 184, 122 N.Y.S. at 208.

111. *Id.* (opinion of Seabury, J.) (Gavegan, J. found no such implicit provision in the contract but nonetheless found the publisher in breach.).

112. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953); *Chaplin v. Amador*, 93 Cal. App. 358, 269 P. 544 (1928).

author's identity for commercial purposes.¹¹³ Unlike defamation, the right to publicity may be assigned and can be asserted by the assignee after the artist's death.¹¹⁴

Furthermore, in *Gieseeking v. Urania Records, Inc.*,¹¹⁵ the New York court recognized that a performing artist has property right in his performance, that the artist's performance "shall not be used for a purpose *not intended*, and particularly in a manner which does not fairly represent his service."¹¹⁶

Colorization only affects popular filmmakers. Only the colorization of films that were box office successes in black and white will again generate profits from the artist's work and reputation. But the colorized versions, though trading on the artist's black and white achievements, are not the works which propelled these artists to fame. A remedy should exist that protects artists from colorizers who not only hold out their versions as those of the original artists (defamation), but also those who utilize the artist's reputation to market the color-adulterated videotape (right of publicity).¹¹⁷

B. Contract Law

American law minimally provides for the protection of the integrity of an author's or artist's work through contract. Copyrights usually vest in the producers or studios, and less frequently in the director or other participants creating the film.¹¹⁸ Therefore, the director or other artist must insist upon contractual provisions to supplant the otherwise neglected moral rights,¹¹⁹ or more specifically, to protect the black and white film from colorization.¹²⁰ Currently, directors such as Woody Allen must regularly negotiate for such guarantees before beginning work on a motion picture.¹²¹ However,

113. W. KEETON, *supra* note 96, § 117, at 852. See also *Follett v. New Amer. Library, Inc.*, 497 F. Supp. 304, 310-11 (S.D.N.Y. 1980) (author has a right to *accurate* attribution (emphasis added)).

114. *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F. Supp. 288, 290 (E.D.N.Y. 1977), *aff'd*, 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (right to exploit name of Elvis Presley passed to plaintiffs at his death); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975) (right of publicity continues after death of artist).

115. 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. 1956) (The right alluded to by the court had its basis in New York statutory law.).

116. *Id.* at 1035, 155 N.Y.S.2d at 172.

117. Where John Huston's *Casablanca*, Orson Welles' *The Third Man*, and Woody Allen's *Manhattan* would attract audiences because of the artists' reputations, a colorizer would be abusing that publicity by coloring the black and white feature film and then profiting from its distribution. However, proponents of the colorization process consider their efforts as merely the utilization of a "public domain" work—at least, with respect to the first two examples above—and they characterize the colorization process as an original "expression" of art. Thus, the remedy afforded by the right of publicity falls short of the moral rights protection. For further discussion of the proponents' arguments, see Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 Nw. U.L. Rev. 1011 (1988).

118. Kohs, *supra* note 8, at 9-10.

119. See *Clemens v. Press Publishing Co.*, 67 Misc. 183, 122 N.Y.S. 206 (Sup. Ct. 1910) ("The rights of the parties are to be determined primarily by the contract which they make, and the interpretation of the contract is for the court." *Id.* at 183-84, 122 N.Y.S. at 207.).

120. Orson Welles did negotiate a contract that has apparently succeeded in defeating colorization despite Turner's ownership of *Citizen Kane*. U.S. NEWS AND WORLD REPORT, Feb. 27, 1989, at 14.

121. Kohs, *supra* note 8, at 19.

"[g]oing unprotected are the majority of black and white films which existed well before the process was developed."¹²²

American courts tend to interpret the rights that an author retains narrowly, and the rights that an author conveys broadly.¹²³ In *Vargas v. Esquire, Inc.*,¹²⁴ a contract for magazine photos did not require the recognition of a photographer with his cover photographs. Without these specific limitations and protections in his contract, the artist was left without a claim.

The inadequacies with contract provisions are three-fold: 1) directors who are not well established lack the clout to negotiate protective contract provisions with a powerful studio;¹²⁵ 2) black and white films which are presently threatened by colorization were made in the 1930s and 1940s, when colorization was never contemplated, and therefore their creators have no ability to bargain retroactively for pertinent provisions;¹²⁶ and 3) even if a contract guaranty is provided, protection only lasts until the work enters the public domain, when it then may be subject to colorization.¹²⁷

C. *Unfair Competition and the Lanham Act*

When a person imitates the work of another artist in order to profit from it, the person has in reality stolen from the artist and violated laws which protect against unfair competition.¹²⁸ Although this legal theory may provide limited relief for the artist—for example, by allowing an injunction to be granted in the artist's favor—the court needs proof that the defendant has tried "to pass off as his own, the thoughts and works of another."¹²⁹ In *Jaeger v. American International Pictures, Inc.*,¹³⁰ the court found that "unfair competition or otherwise tortious misbehavior [exists] in the distribution to the public of a film that bears [an artist's] name but at the same time . . . distorts . . . his work."¹³¹ With respect to colorization, the colorizers do not claim the original black and white film as their own, but rather the colorized *version* as their own.¹³² Therefore, what appears at first to be an effective remedy, fails entirely.

The Lanham Act has been stretched further than any other legal theory to provide artists with a remedy nearly equal to that of moral right.¹³³ Section 43(a) of

122. *Id.* This includes over 17,000 black and white motion pictures and over 1,400 black and white television series in the United States alone. N.Y. Times, Apr. 22, 1987, at D7, col. 1.

123. See, e.g., *Harris v. Twentieth Century-Fox Film Corp.*, 43 F. Supp. 119, 121 (S.D.N.Y. 1942).

124. 164 F.2d 522 (7th Cir. 1947).

125. Kohs, *supra* note 8, at 19.

126. *Id.*

127. *Id.*

128. *Id.* at 25. Of course, the defenses to unfair competition include the use of a former work: 1) in parody; 2) in fair use; and 3) not marketed as original. However, none of these possible defenses conform to the colorizer's intended use of a black and white film. See *supra* notes 13–18 and accompanying text.

129. *Smith v. Montoro*, 648 F.2d 602, 604–05 (9th Cir. 1981) (film distributor's removal of actor's name from credits held actionable). The court's concern here is the "vital interest of actors in receiving accurate credit for their work." *Id.* at 608. *Montoro* remains one of the most typical and well-recognized examples of unfair competition.

130. 330 F. Supp. 274 (S.D.N.Y. 1971).

131. *Id.* at 278.

132. *Colorization Hearings*, *supra* note 2, at 71, reprinted in Mayer, *supra* note 6, at 66.

133. See *L'Aiglon Apparel Co. v. Lana Lobell, Inc.*, 214 F.2d 649 (3d Cir. 1954) (Court held that the "Lanham Act gives relief to any one who is injured or is likely to be injured by a defendant's conduct." *Id.* at 651.); *Prouty v. National Broadcasting Co., Inc.*, 26 F. Supp. 265 (D. Mass. 1939) (the "Stella Dallas" case) (If a borrowed character

the Lanham Act protects against "the false designation of the origin of the goods, and . . . representing such goods falsely when sending them into the stream of commerce. . . ."¹³⁴ The landmark decision in *Gilliam v. American Broadcasting Company, Inc.*,¹³⁵ involving the popular British comedy series, Monty Python's Flying Circus, granted relief to the artists when ABC overedited and censored the program without the consent of the comic artists.¹³⁶ The injunction against the broadcast of the unauthorized, "mutilated"¹³⁷ series was clearly a preservation of the artistic integrity of the work. However, the court relied on section 43(a) and contractual interpretation to substantiate their ruling.¹³⁸ In dicta, the court observed the need for change in the copyright doctrine, and specifically the need to increase the artist's protection against the presentation of work to the public in distorted form.¹³⁹

The editing and colorization principles can be equated. Academics have acknowledged that subscription to moral right doctrine would *not* "open the floodgates" to directorial complaints¹⁴⁰ when motion pictures are modified for television or otherwise altered. These potential problems, however, remain the most serious arguments against implementation of moral rights. However, moral right implementation would help balance the bargaining positions of the artist against the interests of the producer and the studio. The film industry and American culture will be better served by placing a burden on the producer of a film, rather than denying the artist a recourse to moral right.¹⁴¹ The producer, financially empowered and in control, is in a better position to negotiate for additional terms than the artist. Therefore, if our laws provide for the artists initially, the producer or studio will have

is "such as to injure the [original] author, and to amount to a deception upon the public, it may well be that relief would be afforded by applying well-recognized principles of . . . 'unfair competition.'" *Id.* at 268).

134. 15 U.S.C. § 1125(a) (1982), amended by Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 132, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 3935, 3946 (codified at 15 U.S.C.A. § 1125(a) (West Supp. 1989)), commonly cited as § 43(a) of the Lanham Act, provides:

(a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which— (1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id.

135. 538 F.2d 14 (2d Cir. 1976).

136. *Id.* at 17-18.

137. *Id.* at 18.

138. *Id.* at 22-24.

139. *Id.* at 24-25.

140. Nimmer, *supra* note 25, at 549 (no impediment to industry as long as moral rights are alienable).

141. First, studios and producers, being sophisticated and powerful players in the market, would be better suited to bear the burden of bargaining for moral right provisions than individual artists who often are without the money and power to bargain at all. Second, the European artistic industries (including motion pictures) appear to suffer no serious consequences from the moral right protections. *Their business is prospering.* European artists are producing award-winning motion pictures that are "cashing in at the American box office." *Invasion of the Alien Film-snatchers*, U.S. NEWS & WORLD REPORT, Feb. 15, 1988, at 68. Third, since art is an international commodity, logically American laws should accord with foreign doctrines and work with, instead of against, them. See *infra*, Section IV.

to bear the burden of bargaining for resale, editing, and colorization provisions with the artists.¹⁴²

As illustrated by these examples, only contract law potentially gives the kind of relief that otherwise would be provided by a moral right doctrine. Although new legislative developments bridge some of the gaps between European and American copyright conventions, the inadequacy of American laws persists and will continue until a formal moral right statute is enacted.

IV. COLORIZATION AND THE FRENCH COURTS: THE HUSTONS, LA CINQ, AND THE TURNER ENTERTAINMENT COMPANY

Today, American film artists have to rely on European legal systems in attempts to protect their works from colorizers. In June and November 1988, a French court considered the first claims against the broadcast of a colorized film.¹⁴³ A Parisian station, La Cinq, was enjoined from televising a colorized version of John Huston's *Asphalt Jungle*.¹⁴⁴ Under French copyright law, which incorporates the principles of the Berne Convention, the economic rights of the author may be transferred, but the moral rights, inalienable and unassignable,¹⁴⁵ protect the film against the colorization process.¹⁴⁶ Subsequently, the Hustons and Ben Maddow, the principal screenwriter of *Asphalt Jungle*, asked the Tribunal de Grand Instance de Paris for an injunction not only against the telecast of the colorized version of *Asphalt Jungle*, but all colorized versions of John Huston's work. In addition, the plaintiffs demanded damages under the French law.¹⁴⁷ The court found for the Hustons and Ben Maddow, granted the injunction against the French station, and found colorization in violation of a filmmaker's moral rights.¹⁴⁸

On appeal, the Cour d'Appel de Paris reversed the lower court's decision on two main grounds. First, the court overruled the injunction on the bases that the law of the country of the film's origin, the United States, controls, and the United States in general and California in particular had no moral right doctrine.¹⁴⁹ Nothing in the Berne or the Universal Copyright Conventions permits one country to invoke its laws to remove contractual obligations undertaken in another country.¹⁵⁰ Second, even under French law, moral right would not attach because the relationship between the creative artists and the studio/producer when *Asphalt Jungle* was made was not analogous to the director-producer relationship required for French moral right

142. Of course, this arrangement will not help the artists involved with black and white motion pictures before the establishment of these bargaining positions. See *supra* note 122 and accompanying text. These films and artists will need protection retroactively.

143. Judgment of July 6, 1989, Cour d'appel, Paris (La Societe Turner Entertainment Co., appealing from Anjelica and Daniel Huston and Societe Realisation de Filmes (SRF) v. La Societe d'Exploitation de la Cinquieme Chaine de Television, La Cinq), slip op. at 4-5 (copy available from the court; copy on file at Ohio State Law Journal).

144. *Id.*

145. See *supra* note 67.

146. See Nimmer, *supra* note 25, at 518.

147. Judgment of July 6, 1989, slip op. at 4-5.

148. *Id.* at 5-6.

149. *Id.* at 13.

150. *Id.* at 16.

protection.¹⁵¹ In 1948, American producers controlled every aspect of the filmmaking and American artists were never considered to have moral rights in their films; therefore, the court found that Huston and Maddow had willingly submitted to the "authoritarian" producer and thereby surrendered any unrecognized moral rights.¹⁵²

French laws are the strongest concerning artists' rights,¹⁵³ and the defeat of the Huston's suit at the appeals level only underscores the importance of adopting moral rights protections in the United States. The resolution of the conflict of laws in favor of the country of a film's origin, if followed by other jurisdictions, means that films made in France, under the conditions contemplated by French moral rights law, will have such protection not only in France but in other countries as well. This may induce some of America's finest talents to make films in France in order to obtain internationally the protections they so richly deserve. If the United States wants to maintain its historical position as an artistic leader in cinema, federal and state governments would do well to consider expanded moral rights protection. Thus, this recent ruling supports the reasonableness of the American artists' movement for immediate implementation of moral rights into statutory law and *complete* accession to the Berne Convention.¹⁵⁴

V. NEW LEGISLATION: AMERICA'S LIMITED ACCEPTANCE OF THE BERNE CONVENTION AND THE CONTINUED SUPPRESSION OF MORAL RIGHT

In October of 1988, President Reagan signed into law H.R. 4262, which established the United States' partial accession to the Berne Convention.¹⁵⁵ This law, however, did not significantly alter the fate of black and white motion pictures as *full* accession would have.¹⁵⁶ In fact, the new law provides only a "minimalist approach" to the Berne Convention, and specifically limits the moral right section of the international treaty. It appears that if any group's interests are to be compromised by Congress, it will be those of the artist.¹⁵⁷ If the United States is not yet ready for moral right implementation, especially considering the dilemma colorization poses to

151. *Id.* at 15.

152. *Id.* at 20. However, it is expected that the decision will be appealed to the highest civil court in France, the Cour de Cassation, for final deliberation. 38 Pat., Trademark & Copyright J. (BNA) No. 295, 296 (July 25, 1989).

153. *French Court Blocks An Altered Film*, N.Y. Times, July 11, 1988, at C13, col. 3.

154. See *supra* note 24 and accompanying text. Although the United States has recently subscribed to the Berne Convention, the moral right aspect of Berne has been afforded "minimalist" concern. See *infra* notes 155-59 and accompanying text.

155. Berne Convention Implementation Act of 1988, Pub. L. No. 100-560, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2853 (codified as amendments to various sections of 17 U.S.C.A. (West Supp. 1989)).

156. *United States Adheres to the Berne Convention*, 36 J. COPYRIGHT SOC'Y 1 (1988) [hereinafter *Berne Adherence*].

157. *Id.* at 17.

The best illustration of [the] minimalist approach is in the area of moral rights. I believe Congress should reexamine the protections afforded American artists by current law to prevent improper alterations of their works. Some argued that we should use this legislation as a vehicle for that initiative. . . [but] no change in our law on artist's rights is needed to meet Berne's standards. [Also], the debate over this issue would not have advanced the vital goal of Berne adherence, which is the only object of this legislation."

Id., quoting 134 CONG. REC. S14552 (daily ed. Oct. 5, 1988) (statement of Sen. Leahy).

the motion picture industry, then the question becomes *when* the United States will be ready, or whether it will *ever* adopt this protective doctrine.¹⁵⁸

In addition to the Berne Convention accession, the National Film Preservation Act of 1988¹⁵⁹ established a thirteen-member National Film Preservation Board to select up to twenty-five films each year for inclusion in a national film registry. The measure also requires disclaimers for directors and screenwriters on colorized films or motion pictures that are "materially altered."¹⁶⁰ Optimistically, this new law is at least a recognition of the artists' movement against colorization and against associating the original artists with the altered version. However, no legal remedies are available for the adulteration of the work itself.¹⁶¹ If the colorizers or television editors do not include the required disclaimers, litigation may ensue—unless of course the director and principal screenwriter approve the alteration.

The proposed "Film Integrity Act of 1987" (H.R. 2400) would have prohibited colorization and other alterations without the permission of the principal screenwriter and director.¹⁶² Similar legislation, reintroduced at each new session of Congress, may lead to the formal recognition of moral right in the United States. However, like other changes in legal doctrine, court interpretation of this new law probably will not expedite the acceptance of a broad-based moral right.¹⁶³ It would please the artist to see judges heed these legislative measures, objectively consider the discomfort the courts have experienced because of the lack of an American moral right doctrine to date, and begin to develop a common law of moral right in anticipation of legislation to come. Unfortunately, it seems doubtful that this will occur. No moral right yet exists in the United States, but the trend is toward a simplification of legal theory, which will afford protection for artworks and provide relief for injured artists.¹⁶⁴

VI. SUMMATION AND RECOMMENDATIONS

Culture has its place in every society. Thus, culture deserves protection like other aspects of our society. By overlooking full artistic protection in American legal

158. "I am glad that my colleagues in the Senate and the House agreed that the only way the United States could join Berne. . . was to leave the moral rights debate for another day." *Id.* See also Chafee, *Reflections on the Law of Copyright: II*, 45 COL. L. REV. 719, 729 (1945) ("For the time being, we had better concentrate our energies on the pecuniary aspects of copyright. We have enough trouble there. After we get the issues of dollars and cents settled satisfactorily, we can go on to moral rights. . ."). Chafee wrote in 1945. How much longer until we get the "dollars and cents" figured out?

159. National Film Preservation Act of 1988, Pub. L. No. 100-446, Title I, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1782-88 (codified at 2 U.S.C.A. §§ 178-78(2) (West Supp. 1989)).

160. *Id.* See also *House Panel Hears Testimony on Film Colorization Legislation*, 36 Pat., Trademark & Copyright J. (BNA) No. 886, at 201 (June 23, 1988).

161. *Final Say Over Films At Issue*, N.Y. Times, Mar. 4, 1988, at C10, col. 14. See also Yarrow, *supra* note 9 (Woody Allen stated, "Unless this is the first crack in the armor that leads to a law protecting the rights of all artists to prevent changes of any type whatsoever to their work without their own consent, then I would say it's meaningless.").

162. *House Panel Hears Testimony on Film Colorization Legislation*, *supra* note 160, at 200. See also 133 Cong. Rec. 1922 (daily ed. May 13, 1987) (remarks of Rep. Gephardt).

163. Even now, after legislation has been passed, federal and state courts and judges will more than likely resist the new law due to unfamiliarity, habit, and Senator Leahy's remarks in the Congressional Record. See *Berne Adherence*, *supra* note 156, at 17-18.

164. Honan, *supra* note 63.

doctrine, the courts implicitly justify the pecuniary basis for our copyright law and thereby alienate the artist from his or her creative rights.

As evidenced by the cited caselaw, statutes, and legislation, the United States political and judicial systems have struggled with the concept of moral right.¹⁶⁵ The courts see the need for the protection, but require deep-rooted common law doctrine or explicit statutory language before invoking or interpreting law to include moral rights.¹⁶⁶ Courts reason that frivolous claims may clog an already overburdened legal system,¹⁶⁷ but do stand ready to apply any acceptable and adequate moral rights statute that passes the legislature. Unfortunately none have, and time is of the essence.¹⁶⁸

American laws have consistently extracted and compiled the most favorable doctrines from the national legal traditions of our forebears. Many Americans have European heritages, and many of our laws are extensions of and embellishments upon the old civil law rules of these nations. Yet in copyright, our law has not followed the innovative path.¹⁶⁹

Unlike those of many nations, American copyright laws and the 1976 Act have maintained an archaic basis¹⁷⁰ until recently and neglected the needs of a changing, advancing society. As in other areas, the American legal system should be setting new trends in copyright law; however, the economic orientation of American legal theory has paralyzed moral right development.¹⁷¹ American laws protect pecuniary interests, but leave creative interests defenseless. The financial motives behind colorization and colorizers are well known and clearly documented.¹⁷² The broad public interest in artistic integrity and historical accuracy suffers for the sake of immediate profits made by catering to the laziest and most careless impulses of consumers.¹⁷³

Moreover, the interests of business should not dictate legal doctrine.¹⁷⁴ The law

165. See *supra* section III.

166. Nimmer, *supra* note 25, at 522.

167. *Berne Adherence*, *supra* note 156, at 36–37 (quoting 134 CONG. REC. S14557 (daily ed. Oct. 5, 1988) (statement of Sen. Leahy)). But see *supra* notes 140–41 and accompanying text.

168. Dawson, *supra* note 57.

169. Comment, *supra* note 31, at 1539.

170. *Id.* at 1542–45. See *supra* notes 58–61 and accompanying text.

171. Because of the concentration on profitability of commercial endeavors in our society, American laws dictate protections in copyright over and above protections for the artist. Colorization is a perfect example. In music, DATs (digital audio tapes)—new “equipment [which should] raise home recording to a level of perfection that will have a disastrous effect on the sale of recordings”—may soon infiltrate the marketplace due to the product’s potential for profit. For further discussion see Honan, *supra* note 63.

172. Dawson, *supra* note 57; Linfield, *The Color of Money*, AMER. FILM, Jan./Feb. 1987, at 29; Corliss, *Raiders of the Lost Art*, TIME, Oct. 20, 1986, at 98. Proponents of the colorization process argue that the market for colorized films 1) gives owners of old films the financial motivation to preserve them and 2) gives audiences the chance to see films that otherwise would not be readily available. See 34 Pat., Trademark & Copyright J. (BNA) No. 830, at 34 (May 14, 1987). Also, proponents suggest that prohibition of colorization would infringe upon their first amendment right of free expression. Thus, consumers are left to judge whether these colorized works have artistic merit. See *supra* note 18 and accompanying text. Cf. *supra* note 91 and *infra* note 175.

173. See Honan, *supra* note 63, at C29, col. 1.

174. *Id.* Lobbying groups have great influence on the acceptance or rejection of a bill. Although conglomerates like IBM supported the United States’ subscription to the Berne Convention, their needs and not those of the artists were served by the “minimalist approach” to moral rights. See also *Berne Adherence*, *supra* note 156, at 35 (quoting 134 CONG. REC. S14557 (daily ed. Oct. 5, 1988) (statement of Sen. Leahy)).

must assume the responsibility and draw the line between what is a purposeful, creative endeavor and what is purely a profit-driven adulteration of art. Freedom is important, but so is protection.¹⁷⁵ Without specific guidelines, people will continue to steal, alter, and claim another's work as their own. Artists, and with them creativity, may retreat permanently from American soil.¹⁷⁶ The United States Constitution grants freedom of expression, but there are inherent limits to that freedom—for example, when some activity affects another citizen, or invades the privacy of others.¹⁷⁷

The borders of copyright law remain vague. Until lines are clearly drawn and the copyright law speaks specifically to all artistic needs and protections, artistic integrity may be completely lost.¹⁷⁸ Consequently, to gain the protection of French law, American filmmakers may move to France. The motion picture industry, an American artform and one of the United States' most profitable businesses, may also be required to seek refuge on foreign soil.¹⁷⁹

Full accession to the Berne Convention or implementation of an American moral right would eliminate the majority, if not all, of these problems. A statute providing for full accession would give the statutory basis for moral rights decisions. Artists would have claims against those who violate the statute. The laws would speak specifically to the extent and limit of moral rights as foreign laws have,¹⁸⁰ or the courts could interpret the law and apply it as justice demands. Where lengthy litigation and debate are now required, an action could be dismissed summarily if moral right laws were enacted.

The National Film Preservation Board will provide an excellent home for black and white motion picture classics, but the underlying National Film Preservation Act

175. Proponents of colorization suggest that the public should be allowed to cultivate its own artistic tastes, but in fact, what proponents are supporting is the modification of an artist's labor and creation by a computer process for a quick profit. The majority of the American public is planted in front of the television set and children "are among TV's most ardent fans." Children react more positively to a color television broadcast. C. STEINBERG TV FACTS 91, 92 (1985). Yet because children prefer ice cream and fast food, a diet fortified with confections and hamburgers is *not* thereby justified or appropriate. Children should be nourished by artistic integrity and historical honesty so that they may appreciate the development, advancement, and value of art and its multifarious mediums. Colorization obliterates that history—it makes impossible that education, and it candy-coats that artistry. If colorization persists, children will never question why *Asphalt Jungle* is a black and white film. They will lose the opportunity to learn and to recognize on their own the differences between black and white and color film artistry. The same obliteration would result from the addition of voices to silent films. No one has the right to decide what an artist *would have done* had modern technology been available, especially when black and white and silent films continue to be produced. But Congress has the right to protect, as public policy demands, the history, the educational value, and the integrity of "the Arts" for "the public good." See *supra* notes 78–79 and accompanying text.

176. If artists remain unprotected in the United States, their only chance for retaining moral rights will be if productions are foreign, preferably French. Pessimistically speaking, the U.S. could lose talented Americans, who seek such full protection, to Europe. See *supra* Section IV.

177. Even public figures who are subject to a greater public scrutiny in the press may be allocated right to privacy remedies if others abuse their freedoms of expression. See, e.g., *Onassis v. Christian Dior-New York, Inc.*, 122 Misc.2d 603, 472 N.Y.S.2d 254 (Sup. Ct. 1984), *aff'd*, 110 A.D.2d 1095, 488 N.Y.S.2d 943 (1985).

178. See *supra* note 158 and accompanying text.

179. Another negative aspect of permitting colorization is the fact that it affects an *American* art form. Although European countries claim the origins of the great painters, sculptors, and musicians, with little debate the world would agree that the United States has bred some of the greatest cinematic artists in history. If only to protect this art form for the sake of our history, an argument may exist against colorization. See *Colorization Hearings*, *supra* note 2, at 36–38, reprinted in Allen, at 82–83 (statement of Milos Forman).

180. Berne text, *supra* note 37.

does not speak to the artist's moral rights. A disclaimer on a colorized film may discourage viewers, but it will not give the artist the right to control his work and maintain the fruits of his intellectual labor.¹⁸¹ This can only be achieved through the establishment of a moral right.¹⁸² Although courts try to provide moral right remedies through the application of other legal doctrines,¹⁸³ such laws cannot substitute for moral right protection.

Thus, if art reflects society in America today, the reflection is not one of genuine innovation, artistic integrity, and historical honesty, but one of egocentricity, profitability, and disrespect. Americans depend on their freedom of expression, but in conjunction with that right, American artists rely on protection so that their expressions maintain their original, intended meaning.¹⁸⁴

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181. Proponents argue that colorization is *not* a destruction of the original work, but a version of a copy—on videotape. But in order for film artists to be appreciated, *exhibition is crucial*. Unlike paintings, films are duplicated and distributed. The film director and producer receives the "fruits of his labor" by exhibiting his artwork—whether it be in a movie theatre or on television. Because the black and white original remains unharmed, sitting in a can in a film library somewhere, does not justify the colorization of a videotaped copy. If colorizers were color-coding films for their own personal use, American artists—as well as those abroad—would not question their activity. However, the Ted Turners of this world are interested in something beyond colorization and saving old movies. They are interested in "making a profit," even if it is at the expense of the intent of thousands of motion picture artists.

182. Although articles and legislation have proposed otherwise, the only appropriate means to provide motion picture artists with these rights is to adhere fully to the Berne Convention or to pass H.R. 2400, the Film Integrity Act of 1987. In reality, moral right affects every artist. Therefore, full accession to the Berne Convention would preempt the need for the mentioned legislation.

183. See *supra* section III.

184. In *Clemens v. Press Publishing Co.*, 67 Misc. 183, 183–84, 122 N.Y.S. 206, 207 (Sup. Ct. 1910), Judge Seabury explains quite succinctly:

Even the matter of fact attitude of the law does not require us to consider the sale of the rights to a production in the same way that we would consider the sale of a barrel of pork. . . . While an author may write to earn his living, and may sell his literary productions, yet the purchaser in the absence of a contract which permits him to do so, cannot make as free a use of them as he could do of the pork which he purchased. If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled not only to be paid for his work, but to have it published in the manner in which he wrote it.

(emphasis added).

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